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ARTICLE

WHAT DO THE FREE EXERCISE AND NONESTABLISHMENT NORMS FORBID? REFLECTIONS ON THE CONSTITUTIONAL LAW OF RELIGIOUS FREEDOM*

MICHAEL J. PERRY**

I. INTRODUCTION

The Constitution of the United States famously declares, in the First Amendment, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Yet, it is settled constitutional law that not just Congress but the entire national government—and not just the national government but state government too—may not establish religion or prohibit the free exercise thereof.[1] For Americans today, the

 This essay is my contribution to the symposium held at the University of St. Thomas School of Law (Minneapolis, Minnesota) on Oct. 17-18, 2003, honoring John Noonan's scholarship, a prominent part of which focuses on questions of religious freedom. *See e.g.* John T. Noonan, Jr., *The Lustre of Our Country: The American Experience of Religious Freedom* (U. of Cal. Press 2000); John T. Noonan, Jr. & Edward McGlynn Gaffney, Jr., *Religious Freedom: History, Cases, and Other Materials on the Interaction of Religion and Government* (Found. Press 2001).

I am grateful for the comments I received in two venues in addition to the University of St. Thomas School of Law: Southern Methodist University School of Law, where a draft of this essay was the basis of a lecture I delivered (Mar. 4, 2003), and Seton Hall University School of Law, where a draft was discussed in a faculty workshop (Sept. 5, 2003). The vigorous discussion at Seton Hall, with Angela Carmella and several of her colleagues, was especially illuminating. For helpful comments on an early draft, I am grateful to Dan Conkle, Fred Gedicks, Steve Gey, Varda Gilo, Bill Marshall, Steve Smith, and the Wake Forest University law students who in recent years took my course on the constitutional law of religious freedom.

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1. *See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (first case in which Supreme Court applied free exercise clause to states); *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1 (1947) (first case in which Supreme Court applied establishment clause to states); *see also* Michael W. McConnell, *Accommodation of Religion: An Update and Response to the Critics*, 60 Geo. Wash. interfere with the establishment of state churches as they then existed in the various states. After the L. Rev. 685, 690 (1992): "The government may not 'establish' religion and it may not 'prohibit' religion." McConnell explains, in a footnote attached to the word "establish," that

serious question is not whether the free exercise norm and the nonestablishment norm—the two principal matrices of the constitutional law of religious freedom—apply to the whole of American government, including state government. They *do* so apply. The serious question is not even whether the free exercise and nonestablishment norms should apply to the whole of American government. In the judgment of most Americans who bother to think about the matter, they *should* so apply.[2] It is not surprising, then, that the sovereignty of the two norms over every branch and level of American government is constitutional bedrock.[3]

For Americans today, the serious question, regarding the free exercise and nonestablishment norms, is this: What does it mean to say that government, state as well as national, may neither prohibit the free exercise of, nor establish, religion? In particular, what sorts of government action—laws, policies, etc.—do the free exercise and nonestablishment norms forbid? At the risk of understatement: Not every scholar or judge gives the same answer to this question. My aim here is to give the answer that makes the most sense to me.

II. THE FREE EXERCISE NORM

Although it is indisputably a bedrock constitutional rule in the United States that government may not prohibit the free exercise of religion, it is a

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> [t]he text [of the First Amendment] states the "Congress" may make no law "respecting an establishment" of religion, which meant that Congress could neither establish a national church nor last disestablishment in 1833 and the incorporation of the First Amendment against the states through the Fourteenth Amendment, this "federalism" aspect of the Amendment has lost its significance, and the Clause can be read as forbidding the government to establish religion.

Id. at 690 n. 19.

On the controversial question whether the Fourteenth Amendment was originally meant to make the First Amendment's free exercise and nonestablishment norms applicable to the states, see Daniel O. Conkle, *Constitutional Law: The Religion Clauses* 21-25 (Found. Press 2003) (not so meant); *see also* Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 Ohio N.U. L. Rev. 1 (1998). For an argument that the Fourteenth Amendment was not understood to make any First Amendment norm applicable to the states, including the free speech and free press norms, see Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 Vand. L. Rev. 1539 (1995). By contrast, Kurt Lash has argued that the Fourteenth Amendment was meant to make applicable to the states both a broad free exercise norm and a nonestablishment norm. *See* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106 (1994); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. St. L. J. 1085 (1995).

2. It is an important question whether and why the citizens of the United States—indeed, of any liberal democracy—should want to protect, in their constitutional law, the free exercise of religion. It is also an important question whether/why they should want to guard against, in their constitutional law, the establishment by government of religion. These are not, however, questions I pursue in this essay.

3. *See* Michael J. Perry, *We the People: The Fourteenth Amendment and the Supreme Court* 20-23 (Oxford U. Press 1999) (on the idea of constitutional "bedrock").

matter of vigorous controversy what it *means* to say that government may not prohibit the free exercise of religion.[4] What sorts of government action should we understand the free exercise norm to forbid?

The "exercise" of religion comprises many different but related kinds of religious practice, including: public affirmation of religious beliefs;[5] affiliation, based on shared religious beliefs, with a church or other religious group; worship or study animated by religious beliefs; the proselytizing dissemination of religious beliefs or other religious information; and moral choices, or even a whole way of life, guided by religious beliefs.[6] The free exercise norm has never been understood, because it would be conspicuously implausible to understand it, to forbid government to prohibit any religious practice whatsoever—for example, human sacrifice.[7] By its very

4. *See infra* nn. 29-31 and accompanying text.

5. Paradigmatic instances of "religious" belief are the belief that God exists—"God" in the sense of a transcendent reality that is the source, the ground, and the end of everything else—and beliefs about the nature, the activity, or the will of God. *See* David Tracy, *Kenosis, Sunyata, and Trinity: A Dialogue With Masao Abe* in *The Emptying God: A Buddhist-Jewish-Christian Conversation* 135 (John B. Cobb, Jr. & Christopher Ives eds., Orbis Books 1990) (Tracy notes that although some Buddhist sects are theistic, Buddhism—unlike Christianity, for example—is predominantly nontheistic, in the sense that Buddhism does not affirm the meaningfulness of God-talk. Nonetheless, Buddhism arguably does affirm the existence of a transcendent reality that is the source, the ground, and the end of everything else.).

A belief can be "nonreligious," then, in one of two senses. The belief that God does not exist is nonreligious in the sense of "atheistic." A belief about something other than God's existence or nonexistence, nature, activity, or will is nonreligious in the sense of "secular."

6. For a list of typical religious practices, see Article 6 of the United Nations's *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*:

> [T]he right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the following freedoms:
> (a) To worship or assemble in connection with a religion or belief, and to establish or maintain places for these purposes;
> (b) To establish and maintain appropriate charitable or humanitarian institutions;
> (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs or a religion or belief;
> (d) To write, issue and disseminate relevant publications in these areas;
> (e) To teach a religion or belief in places suitable for these purposes;
> (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
> (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
> (h) To observe days of rest and to observe holidays and ceremonies in accordance with the precepts of one's religion or belief;
> (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

G.A. Res. 36/55, U.N. GAOR, Off. of the High Commr. for Human Rights, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, art. 6 (1981) (available at http://www.unhchr.ch/html/menu3/b/d_intole.htm) (accessed Feb. 5, 2004).

7. *See Reynolds v. U.S.*, 98 U.S. 145, 166 (1879) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?").

terms the norm forbids government to prohibit, not the exercise of religion, but the "free" exercise of religion—that is, the freedom of religious exercise. Just as government may not abridge "the freedom of speech" or "the freedom of the press,"[8] so too it may not prohibit the freedom of religious exercise. The freedom of religious exercise is not an unconditional right to do, on the basis of religious belief or for religious reasons, whatever one wants. One need not concoct outdated hypotheticals about human sacrifice to dramatize the point. One need only point, for example, to the refusal of Christian Science parents to seek readily available lifesaving medical care for their gravely ill child.[9] Just as the freedom of speech is not a license to say, and the freedom of the press is not a license to publish, whatever one wants wherever one wants whenever one wants, so, too, the freedom of religious exercise is not—it cannot be—a license to do, on the basis of religious belief or for religious reasons, whatever one wants wherever one wants whenever one wants. The constitutional freedom of religious exercise is, rather, the freedom to practice—to "put into practice"—one's religion (religious beliefs) to the extent doing so does not damage any interest that government may protect, such as human life. It is worth noting here that the international law of human rights acknowledges that the freedom of religion and conscience is not absolute, but only conditional. For example, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief provides, in Article I, paragraph 3: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others."

In the United States, then, to say that government may not prohibit the free exercise of religion neither means nor should mean that government may not prohibit any religious practice whatsoever. Government may prohibit some religious practices: practices that damage or destroy, or that threaten to damage or destroy, one or more interests that government may protect. Whatever else—whatever more—it may mean to say that government may not prohibit the free exercise of religion, it means *at least* this: In banning, or in otherwise impeding, by regulating, a religious practice, government may not discriminate against religion—whether one or more religions or, at the limit, all religion. It is one thing to leave government free to protect those interests—call them "legitimate" interests—that any just gov-

8. The First Amendment declares: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

9. *See e.g. Lundman v. McKown*, 530 N.W.2d 807 (Minn. App. 1995); *see also* Caroline Frasier, *Suffering Children and the Christian Science Church*, 275 Atlantic Monthly 105 (Apr. 1995).

ernment would want to protect (e.g., human life); it is another thing altogether to leave government free to discriminate against religion in the guise of protecting such an interest. Government is not free, under the free exercise norm, to do the latter. Government may not discriminate against religion in the guise of protecting a legitimate interest. The free exercise norm, thus understood, is an antidiscrimination norm. (Whether the free exercise norm means *more than* this, whether it is *more than* an antidiscrimination norm, is a separate question, about which I have something to say below.) Moreover, the Supreme Court construes the free exercise norm to be an antidiscrimination norm. (Indeed, a majority of the Court construes the norm to be *no more than* an antidiscrimination norm.[10]) As Professors Sager and Eisgruber have noted, the Court is best understood, in its principal recent free exercise cases,[11]

> as emphasizing a deep point about the *conceptual structure* of religious liberty, not simply a view about *how much* religious liberty is desirable or how it competes with other constitutional and political values. The point is this: the only sound conception of religious liberty is founded upon protecting religious exercise against persecution, discrimination, insensitivity, or hostility.[12]

But what precisely does it mean to say that the free exercise norm is an antidiscrimination norm? What does it mean to say that government may not discriminate against religion—whether one or more religions or all religion? What sorts of laws does the free exercise norm, understood as an antidiscrimination norm, forbid government to enact, what sorts of policies does it forbid government to adopt?[13]

Assume that a state legislature has enacted a law banning (or otherwise impeding) some particular conduct, C. Assume too that C is, for some who engage in it, perhaps even for many if not all who engage in it, a religious practice—a practice animated by religious belief or undertaken for religious reasons. C may be, for example, the ingestion of peyote[14] or the slaughter of animals.[15] If the legislature would have banned C even if C had not been, for anyone who engages in it, a religious practice, then, in banning C,

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10. *See infra* n. 31.

11. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Empl. Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872 (1990).

12. Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty after* City of Boerne v. Flores, 1997 S. Ct. Rev. 79, 104 (1997).

The antidiscrimination understanding of religious liberty is a classic understanding. *See e.g.* Stanley Fish, *Mission Impossible: Settling the Just Bounds Between Church and State*, 97 Colum. L. Rev. 2255, 2265-79 (1997) (presenting John Locke's understanding of religious tolerance).

13. What follows in the text is an elaboration and refinement of an argument about the meaning of the free exercise, now qua antidiscrimination, norm that I first floated about four years ago. *See* Michael J. Perry, *Freedom of Religion in the United States: Fin de Siècle Sketches*, 75 Ind. L.J. 295, 299-302 (2000).

14. *See Smith*, 494 U.S. 872.

15. *See Hialeah*, 508 U.S. 520.

the legislature has not discriminated against religion. But if the legislature banned C because, or partly because, C is, for some, a religious practice—that is, if the legislature would not have banned C had C not been, for some, a religious practice—then the legislature has discriminated against religion in the guise of protecting a legitimate interest. It is one thing for a legislature to oppose some conduct—for example, a parent's refusal to seek readily available lifesaving medical care for her gravely ill child—without regard to whether or not the conduct is, for some, a religious practice. It is another thing altogether for a legislature to oppose some conduct (partly) because the conduct is, for some, a religious practice. The latter opposition is directed not at *the conduct itself* but at *the religion behind the conduct*—that is, it is directed specifically at the religious beliefs that animate the conduct or the religious reasons for which the conduct is undertaken. In that sense, the latter opposition discriminates against religion—the religion behind the conduct. As the Supreme Court put the point in 1990: A legislature

> would be "prohibiting the free exercise [of religion]" if it sought to ban [acts or refusals to act] only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.[16]

By contrast, to oppose the conduct itself is to oppose the intentional physical acts of which the conduct consists no matter what beliefs or ideas animate, or what reasons motivate, the conduct; in particular, it is to oppose the conduct *whether or not* any religious beliefs or ideas animate, or any religious reasons motivate, it—and, so, even if *no* religious beliefs or ideas animate, or any religious reasons motivate, the conduct. Such opposition is not directed specifically at—and, in that sense, it does not discriminate against—the religion behind the conduct.

Does it follow, then, that if the legislature did not ban C because C is, for some, a religious practice—that if the legislature would have deemed C harmful to a legitimate interest and would have banned C even if C were

16. *Smith*, 494 U.S. at 877-78. Obviously it would make no sense, it would be naive and even foolish, to forbid government to ban "the casting of 'statues that are to be used for worship purposes'" while leaving government free to deny to persons, because they cast such statues, a benefit that it would otherwise give to them. "[T]o condition the availability of [unemployment] benefits upon [one's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

The so-called "symbolic speech" cases have yielded an analogous approach. Imagine conduct that is an act of communication for at least some who engage in it—for example, burning an American flag. Government violates the core of the free speech norm by banning (or otherwise impeding) such conduct if government would not have done so were the conduct not, for some, a communicative act. *See e.g. Tex. v. Johnson*, 491 U.S. 397 (1989); *U.S. v. O'Brien*, 391 U.S. 367 (1968).

not, for some, a religious practice—the legislature did not discriminate against religion in the guise of protecting a legitimate interest? No, it does not follow; the matter is not so simple. Assume that the legislature would have banned C even if C were not, for some, a religious practice. But assume too that had the legislature not been hostile or indifferent to the religious group (or groups) for which C is a religious practice—that had the legislature not been hostile or indifferent to the religious group *as such*, as a *religious* group; i.e., *because of its specifically religious beliefs*—the legislature would have distinguished between those instances of C that are undertaken as a religious practice and those instances of C not so undertaken and would have banned only the latter instances. Put another way, it may nonetheless be the case that but for its hostility or indifference to the religious group as such, the legislature would have exempted from the ban on C instances of C undertaken as a religious practice. For example, if C is the ingestion of peyote, and if the sacramental ingestion of peyote is a ritual of the Native American Church,[17] then though a legislature may well have banned C even if C were not, for members of the Native American Church, in certain circumstances, a sacramental act, it may still be the case that the legislature would have exempted the sacramental ingestion of peyote from the ban on C if the legislature had not been hostile or at least indifferent to the Native American Church as a religious group. We know that a racial group can be a victim of a policymaker's *racially* selective sympathy and indifference,[18] just as we know that women can be victims of a policymaker's *sexually* selective sympathy and indifference. Similarly, a religious group can be a victim of a policymaker's *religiously* selective sympathy and indifference.

Legislators and other policymaking officials will sometimes have less respect and concern for one religious group than for another. This is inevitable, given the strangeness, to many officials, of some religious groups; indeed, this is understandable, given the disgusting morality of some religious groups (e.g., "Christian" white supremacists). Nonetheless, if a legislature or other policymaker wants to extend its ban on C even to those instances of C undertaken as a religious practice, the free exercise norm requires that the legislature or policymaker do so for some reason other than diminished respect and concern for, much less outright hostility to, the religious group for whom the conduct is a religious practice. By "diminished" respect and concern, I mean less respect and concern than government typically shows other, more familiar and popular religious groups—or less respect and concern than government would likely show such a group if one of the group's practices (e.g., the sacramental drinking of wine at Mass) were to become threatened by a restrictive public policy.

17. *See Smith*, 494 U.S. 872.

18. Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv. L. Rev. 1, 7 (1976) (discussing "racially selective sympathy and indifference").

If a legislature would not have extended its ban on C to religious instances of C had the legislature not been hostile or indifferent to the religious group for which C is a religious practice, then in declining to exempt religious instances of C, the legislature undeniably discriminated against the religious group in the guise of protecting a legitimate interest.

Consider two scenarios: In the first, a legislature has declined to exempt a religious practice from a ban on C because the legislature is hostile to the religious group that would benefit from the exemption; in the second, a legislature has declined to exempt a religious practice from a ban on C because an exemption would disserve a legitimate, weighty governmental interest. It seems clear that in the first scenario, but not in the second, the legislature is discriminating against the religious group. Let us assume that a legislature or other policymaker would have banned C even if C had not been, for some, a religious practice. Nonetheless, by refusing to exempt a religious practice from the ban on C, the legislature discriminates in violation of the free exercise norm if it would have exempted the religious practice had the legislature not been hostile or indifferent to the religious group (i.e., hostile or indifferent to it as a *religious* group) that wants to engage in the practice.

A brief digression. With respect to the question of the proper meaning of the free exercise norm, it would make little if any sense to distinguish between hostility to a religious group and indifference to the group. Imagine three different attitudes, conjoined with corresponding behavioral choices:

> (1) I dislike them (a religious minority) so much, because of their offensive beliefs about the nature of God, that I will, at an opportune moment, go out of my way to harm them.
> (2) I dislike them, not enough to go out of my way to harm them, but enough not to go out of my way to help them if or when they are in trouble.
> (3) I don't dislike them. But I don't like them either. I'm indifferent to them. So I certainly won't go out of my way to help them if or when they are in trouble.

Attitude (1) is fairly described as "hostility"; attitude (2) is fairly described as "hostility" too, albeit of a weaker sort than attitude (1); and attitude (3) is fairly described as "indifference." I don't know why we should assume that there is a constitutionally significant difference between attitude (2) and attitude (3). But even if we assume, for the sake of discussion, that there is a constitutionally significant difference between the two attitudes, there is no reason to think that judges could excavate the relevant facts so thoroughly that they could confidently identify which legislative restrictions on a religious practice—in particular, which legislative refusals to exempt a religious practice from an otherwise applicable restriction—are animated by attitude (2) rather than by attitude (3) and which are animated

by attitude (3) rather than by attitude (2). The most sensible specification of the free exercise norm *qua* antidiscrimination norm, therefore, is one that does not put any weight on—that does not require judges to administer—the distinction between "hostility" and "indifference." End of digression.

Our inquiry has been: What sorts of government action should we understand the free exercise norm to forbid? The answer I have given here: Any sort of government action that discriminates against one or more religious groups as a *religious* group—i.e., *because of its specifically religious beliefs*. Each of the following three scenarios is illustrative of such discrimination:

- Government bans (or otherwise impedes) a practice only when it is religious (i.e., only when it is religiously animated or motivated). Government thereby discriminates against the religious practice—and, therefore, against the religious group that wants to engage in the practice—in violation of the free exercise norm.
- Government bans a practice that is, for some who want to engage in the practice, a religious practice and, for others who want to engage in it, a nonreligious (secular) practice. However, government would not have banned the practice if the practice had not been, for some, religious. Government thereby discriminates against the religious practice—and, therefore, against the religious group that wants to engage in the practice—in violation of free exercise.
- Government bans a practice that is, for some who want to engage in it, a religious practice and, for others, a nonreligious practice. Moreover, government refuses to exempt religious instances of the practice. However, government would have exempted religious instances of the practice had government not been hostile or indifferent to the religious group for which the practice is religious—hostile or indifferent to the group because of its specifically religious beliefs. Government thereby discriminates against the group in violation of free exercise.

Now, let's turn from the theoretical question we've been addressing—the question of the proper understanding of the free exercise norm—to an intensely practical question: What adjudicative strategy should a court deploy—ultimately, the Supreme Court—in its effort to determine whether government is discriminating against a religious group (or groups) in violation of the free exercise norm? In particular, how should a court determine whether—and what would warrant a court concluding that—government would not have banned C had C not been, for some, a religious practice? Or, at least, that government would have exempted religious instances of C had government not been hostile or indifferent to the religious group for which C is a religious practice? (Assume that, before or after the ban was

enacted, the legislature rejected a plea to provide such an exemption.) How should a court structure its inquiry into such counterfactuals? The answer is not complicated. The court should entertain any evidence that is probative of religiously selective sympathy and indifference—in particular: the text of the ban, in conjunction with other relevant legal texts,[19] the legislative history and the larger the social context in which the ban was proposed and enacted,[20] and, not least, the apparent absence of any nontrivial reason for refusing to exempt religious instances of C. If, and only if, such evidence gives rise to a reasonable suspicion

> (1) *either* that government would not have banned C if C had not been, for some, a religious practice,
> (2) *or* that government would have exempted religious instances of C had government not been hostile or indifferent to the religious group for which C is a religious practice,[21]

the court should invite the government to rebut the suspicion of religiously selective sympathy and indifference by showing that the ban, or the refusal to exempt religious instances of C from the ban, protects an important interest that could not be protected, or adequately protected, if religious instances of the conduct were exempted from the ban.[22] If government cannot make that showing to the court's satisfaction—for example, if it appears to the court, at the end of the day, that government could exempt a religious practice from a ban without seriously compromising either the objective that the ban is designed to serve or any other important objective—then the court's suspicion should ripen into this conclusion: Government's refusal to exempt is rooted in religiously selective sympathy and indifference and therefore discriminates against a religious group in violation of the free exercise norm. I envy you, dear reader, if you know of a more sensible way to structure judicial inquiry into the possibility that government would not have banned C had C not been, for some, a religious practice—or the

19. *See Hialeah*, 508 U.S. at 533-40.

20. *Id.* at 540-42.

21. In *Sherbert*, 374 U.S. at 406, the Supreme Court, per Justice Brennan, observed that South Carolina treated Sunday worshippers much more sympathetically than it did Sabbatarians, thereby evincing relative indifference to Sabbatarians. "The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects." *Id.*

22. By "important" interest, I mean principally "the public safety, order, health, and morals" or "fundamental rights and freedoms." According to Article 18 of the International Covenant on Civil and Political Rights, which the United States ratified in 1992, "Everyone shall have the right to freedom of thought, conscience, and religion." *See Basic Documents on Human Rights* 125, 132 (Ian Brownlie ed., 3rd ed., Clarendon Press 1992). "This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." *International Covenant on Civil and Political Rights*, art. 18 (Mar. 23, 1976), 999 U.N.T.S. 171. Article 18 then states: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." *Id.*

possibility that government would have exempted religious instances of C had government not been hostile or indifferent to the religious group for which C is a religious practice.[23]

Assume that the legislature of the state of Appalachia is deliberating about whether to ban the consumption of all alcoholic beverages. It has not yet decided whether to do so, but it *has* decided that *if* it does so, it will exempt the sacramental consumption of wine at Mass.[24] On another front, the legislature has just banned the ingestion of all hallucinogenic substances, including peyote. Moreover, despite pleas to do so, the legislature has refused to exempt the sacramental ingestion of peyote by members of the Native American Church. Would the legislature have granted the exemption but for indifference, if not hostility, to the Native American Church? Assume that there is room for serious doubt that granting the exemption would imperil either the interest the ban is ostensibly designed to protect or any other important interest.[25] Which is more sensible, as a practical matter:

> (1) An approach that requires a litigant to establish directly, and a court to discern directly, the presence of such hostility or indifference?
>
> (2) An approach that tests reasonable suspicion of hostility or indifference indirectly, by proxy as it were, by having the court inquire whether denying the exemption protects an important interest that could not otherwise be adequately protected?[26]

Why should we prefer the former approach, which reflects a naivete about the difficulties of excavating, of ferreting out, hostility or indifference? We seem well aware of those difficulties in the context of racial

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23. For an informed, thoughtful discussion of the problem of proving such counterfactuals, see Douglas Laycock, *Reflections on* City of Boerne v. Flores: *Conceptual Gulfs in* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 743, 771-80 (1998). *Cf. id.* at 747 ([The Religious Freedom Restoration Act of 1993] "excused the plaintiff from the obligation to prove bad motives or overt discrimination, and instead required the state to justify the burdens placed on religion by facially neutral laws.").

24. Recall that the Volstead Act provided that "wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed." Pub. L. No. 66-66, 41 Stat. 305, 308 (1919) (repealed 1921).

The argument I am now in the process of making presupposes that neither this particular exemption (of the sacramental consumption of wine at Mass) nor such exemptions generally (exemptions of religious practices that would otherwise be banned) necessarily violate the nonestablishment norm. *See* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1 (2000) (for a defense of this presupposition).

25. This is a fair assumption. Consider that in 1997, the United States Department of Defense chose to permit the sacramental ingestion of peyote by members of the military who belong to the Native American Church. *See* James Brooke, *Military Ends Conflict of Career and Religion: American Indians Win Ritual Peyote Use*, 147 N.Y. Times A16 (May 7, 1997).

26. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("[W]e must searchingly examine the interests that [Wisconsin] seeks to promote by its requirement for compulsory education to age 16, and the impediment to those objectives that would flow from recognizing the claimed Amish exemption.").

discrimination; there is no reason to turn a blind eye to them in the context of religious discrimination. The fundamental question here, I think, is twofold: How skeptical of ordinary politics, how distrustful, ought we to be—and ought we to want courts to be—when it comes to the protection of religious minorities? And how vigorously ought we to want courts to protect against discrimination, religious minorities and their religious practices? My answer to the first question: very skeptical. My answer to the second: very vigorously. Not that I hold out much hope that courts, including the Supreme Court, would often act boldly to protect religious minorities even if the courts consistently followed the approach proposed here. Our historical experience suggests that they would not.[27] Nonetheless, that approach would open a doctrinal space for the judiciary to protect one or another religious minority more boldly at least once in a while. Something Doug Laycock said comes to mind: "Some of the time, judicial review will do some good. Judges did nothing for the Mormons, but they may have saved the Jehovah's Witnesses and the Amish. If judges can save one religious minority a century, I consider that ample justification for judicial review in religious liberty cases."[28]

Michael McConnell and Sandra Day O'Connor have been, respectively, the principal scholar and the principal Supreme Court justice arguing that there is support in the historical record ("originalist" support) for understanding the free exercise norm to be more than just an antidiscrimination norm. They have argued, in particular, that there is historical support for understanding the norm to impose on government an affirmative requirement as well as a negative one. According to McConnell and O'Connor, the free exercise norm not only requires that government not discriminate against a religious practice. (This is the negative requirement.) It also requires that government go out of its way to accommodate a religious practice by exempting it from an otherwise applicable legal ban, or other legal impediment, unless there is a sufficiently good reason not to do so. (This is the affirmative requirement).[29] Others, however, including

27. *See e.g.* John T. Noonan, Jr., *The End of Free Exercise*, 42 DePaul L. Rev. 567 (1992).

28. Douglas Laycock, *The Benefits of the Establishment Clause*, 42 DePaul L. Rev. 373, 376 (1992).

Note, moreover, that an approach that would require a litigant to establish directly, and a court to discern directly, the presence of such hostility/indifference is, as Steve Smith has explained, "a doctrinal path that leads to a constitutional discourse in which contending parties accuse each other of hostility, persecution, and bad faith. . . . [T]his sort of demonizing debate is precisely what a doctrinal emphasis on motive as a dispositive factor is calculated to elicit." Steven D. Smith, *Exercise Doctrine and the Discourse of Disrespect*, 65 U. Colo. L. Rev. 519, 575-76 (1994). Smith's wise recommendation, defended in a compelling essay: "[I]f one is searching for alternatives, then . . . the discourse of humility and tolerance exemplified in [*Yoder*, 406 U.S. 205] invites renewed consideration." *Id.* Smith discusses, and applauds, the Court's performance in *Yoder* at various points in his essay.

29. McConnell and O'Connor have focused on the record of the founding period of the United States. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990); *City of Boerne*, 521 U.S. at 544-65

Antonin Scalia, have disputed this reading of the historical record.[30] Moreover, a majority of the current Supreme Court justices, including Justice Scalia, have concluded that the free exercise norm is only an antidiscrimination norm.[31] This disagreement about whether the free exercise norm is more than an antidiscrimination norm—about whether the clause imposes an affirmative requirement on government as well as a negative requirement—seems to me largely inconsequential as a practical matter.

> First: Even if, *contra* McConnell and O'Connor, the free exercise norm was originally meant or understood to be more than an antidiscrimination norm—and even if we assume for the sake of discussion that the Supreme Court should therefore construe the free exercise norm to be more than an antidiscrimination norm—it is *still* true, it is *nonetheless* true, that the most sensible way to structure judicial inquiry into the possibility of a violation of the free exercise norm—the most sensible way, that is, even assuming that the free exercise norm is only an antidiscrimination norm—is the way that I have proposed.
>
> Second: That way of structuring the judicial inquiry involves substantially the same approach to free exercise claims that McConnell and O'Connor would have the courts pursue in enforcing the affirmative requirement that, in their view, the free exercise norm imposes on government. Now, there is admittedly a difference between my approach and the McConnell-O'Connor approach: Under my approach, judicial suspicion that by rejecting a plea to exempt a religious practice, government has acted on the basis of indifference or even hostility to the religious group whose practice it is, triggers the requirement that government justify its failure to exempt. Under the McConnell-O'Connor approach, by contrast, judicial suspicion plays no such role; the fact that government has failed to exempt a religious practice, and that fact alone, triggers the requirement that government justify its failure to exempt. As a practical matter, however, this difference is not substantial. Indeed, I am inclined to think that the difference is largely insignificant, that the difference is more apparent than real: That government has rejected a plea to exempt a religious

(O'Connor, J., joined in part by Breyer, J., dissenting). Kurt Lash has argued that even if the record of the founding period does not offer the support that McConnell and O'Connor think it offers, the record of the period leading up to the Civil War and beyond to the adoption of the Fourteenth Amendment—section one of which makes the free exercise norm of the First Amendment applicable to the states—does offer support for the interpretation of the free exercise norm for which McConnell and O'Connor contend. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, *supra* n. 1.

30. *See City of Boerne*, 521 U.S. at 537-44 (Scalia, J., joined by Stevens, J., concurring in part); *see also* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992).

31. *See Hialeah*, 508 U.S. 520; *Smith*, 494 U.S. 872. A majority of current Supreme Court justices are therefore out of step with some earlier Court majorities. *See e.g. Yoder*, 406 U.S. 205; *Sherbert*, 374 U.S. 398.

> practice, coupled with the lack of any obvious, nontrivial justification for refusing to exempt the practice, is surely enough to warrant judicial suspicion that government has acted on the basis of indifference, if not hostility, to the group whose practice it is; once a court is in the grip of such suspicion, government must supply the (nonobvious, nontrivial) justification for its refusal to exempt.

As I said, the Supreme Court understands the free exercise norm to be nothing more than an antidiscrimination norm. (It therefore bears emphasis that nothing I have said or proposed in this essay presupposes that the free exercise norm is anything other than an antidiscrimination norm.[32]) But does the Court follow the approach—the way of structuring the judicial inquiry—that I have proposed here?[33] Does the Court structure judicial inquiry into the possibility that government is discriminating against a religious group—the possibility, that is, that government (a) would not have banned C had C not been, for some, a religious practice or (b) would have exempted religious instances of C from its ban on C had government not been hostile or indifferent to the religious group for which C is a religious practice—does the Court structure such judicial inquiry along the lines I have proposed? In some imaginable but improbable cases, government ac-

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32. It also bears emphasis that nothing I have said or proposed in this essay presupposes that the free exercise norm is *not* something more than an antidiscrimination norm. However, because, as I've explained, the *practical* difference between the antidiscrimination understanding of the free exercise norm and the McConnell-O'Connor understanding—i.e., the "accommodationist" understanding—is largely inconsequential, the question whether or not the free exercise norm is more than an antidiscrimination norm seems to me less than urgent.

33. One would have thought that Congress—which, after all, is charged under section 5 of the Fourteenth Amendment with protecting, among other things, the free exercise norm—was free to codify the approach (the way of structuring the judicial inquiry) that I have proposed here. Congress, with the support of President Clinton, did codify a strong version of the approach—perhaps too strong a version—in the Religious Freedom Restoration Act of 1993 (RFRA). 42 U.S.C.A. § 2000bb *et seq.* (West 2003). According to subsection 3(a) of RFRA: "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)." According to subsection 3(b): "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." In 1997, however, the Supreme Court ruled that RFRA was unconstitutional because it exceeded Congress's power under section 5 of the Fourteenth Amendment. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (unconstitutional, that is, as applied to state government). For a decision that RFRA is not unconstitutional as applied to the federal government, see *Young v. Crystal Evangelical Free Church*, 141 F.3d 854 (8th Cir. 1998), *cert. denied*, 525 U.S. 811 (1998).

In my judgment, the Court was wrong. I concur in the judgment of Douglas Laycock and Michael McConnell that RFRA was not unconstitutional. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153 (1997); Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, *supra* n. 23; *see also* Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. Cal. L. Rev. 589 (1996). The scholarly literature on RFRA—and, in particular, on the constitutionality *vel non* of RFRA—is enormous. *See e.g.* Erwin Chemerinsky, *Symposium: Reflections on* City of Boerne v. Flores, 39 Wm. & Mary L. Rev. 601 (1998).

tion transparently discriminates against a religious group in violation of the free exercise norm.[34] In most real cases, however, such discrimination is not transparent; typically it is far from clear whether challenged government action is religiously discriminatory, and in such cases, some Supreme Court justices seem confused about the best way to structure judicial inquiry into the possibility of religious discrimination. They seem confused about the best way to determine whether challenged government action discriminates against a religious group in violation of the free exercise norm.[35] Suffice it to say that the Court would do well to adopt the approach proposed here, pursuant to which the Court would be open to any evidence that bears on the question whether the ban, or the refusal to exempt from the ban, is based on hostility or indifference; if such evidence gives rise to a reasonable suspicion that the answer is affirmative, the Court would then invite government to rebut the inference by showing that the ban, or the refusal to exempt religious instances of C from the ban, protects an important interest that could not otherwise be adequately protected. Again, this approach, this way of structuring the judicial inquiry, does not presuppose the understanding of the free exercise norm—the "accommodationist" understanding—that the Supreme Court has rejected; instead, this approach is designed to implement the very understanding of the norm—the antidis-

34. *See supra* n. 16 and accompanying text.

35. For an example of such confusion, consider this: In *Hialeah*, Anthony Kennedy, delivering the opinion of the Court, wrote that if government is discriminating against a religious practice ("if the object of the law is to infringe upon or restrict practices because of their religious motivation"), then the discrimination is unconstitutional "unless it is justified by a compelling interest and is narrowly tailored to advance that interest." 508 U.S. at 533, 546. Yet, the function of strict scrutiny should not be to justify a law that discriminates against a religious practice, but to determine whether a law does in fact discriminate against a religious practice. If a law discriminates against a religious practice, the law violates the free exercise norm, period. *See id.* at 579-80 (Blackmun, J., joined by O'Connor, J., concurring in judgment):

> When a law discriminates against religion as such, . . . it automatically will fail strict scrutiny. . . . This is true because a law that targets religious practice for disfavored treatment both burdens the free exercise of religion and, by definition, is not precisely tailored to a compelling governmental interest.
>
> Thus, unlike the majority, I do not believe that "[a] law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny." . . . In my view, regulation that targets religion in this way, *ipso facto*, fails strict scrutiny. It is for this reason that a statute that explicitly restricts religious practices violates the First Amendment.

For another example of confusion, consider this: In the opinion of the Court in *Hialeah*, Justice Kennedy treated the requirement that a law be religiously "neutral" and the requirement that the law be "generally applicable" as two distinct requirements. *Id.* at 489-98. However, and as Justice Scalia seemed to understand, they are really just two different ways of stating a single requirement. *Id.* at 557-58 (Scalia, J., joined by Rehnquist, C.J., concurring in part and concurring in judgment).

crimination understanding—that the Court has embraced.[36] This approach is designed to protect the free exercise norm *qua antidiscrimination norm.*[37]

The understanding of the free exercise norm that I have developed and defended here is congruent with the human right to freedom of religion that is articulated in the international law of human rights. Consider, in particular, Article 18 of the International Covenant on Civil and Political Rights (ICCPR) (to which, as it happens, the United States is a party). According to Article 18(1), the freedom of religion includes the freedom to "manifest [one's] religion . . . in worship, observance, practice, or teaching." Although this freedom is not absolute, it "may be subject *only to such limitations as . . . are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*"[38] Clearly, no law (or other regulation) that fits the following profile can plausibly be deemed "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others": A law that discriminates against a religious group; a law, that is, that would not have been enacted but for, and is in that sense based on, hostility or indifference to a religious group as such. If the free exercise norm is understood as I have argued here it should be understood, we may conclude that any law based on hostility or indifference to a religious group violates both Article 18 of the ICCPR and the free exercise norm of the United States Constitution.

III. The Nonestablishment Norm

Although, as I have just noted, it protects the free exercise of religion ("the freedom to manifest one's religion"), the international law of human rights does not include anything like the American nonestablishment norm. Nonetheless, the nonestablishment norm, like the free exercise norm, is, as I remarked at the beginning of this essay, a principal matrix of the American constitutional law of religious freedom. There is widespread agreement, in the United States—indeed, there is a virtual consensus—that neither the national government nor any state government should establish religion. This consensus partly explains why the rule that government may not establish religion is constitutional bedrock. But what does this rule—the nonestablishment norm—mean? What sorts of government action should we understand the nonestablishment norm to forbid?

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36. *See supra* n. 31.

37. For cases in which the court has pursued an approach substantially like the one I have defended here, see *Fraternal Or. of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999); *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996).

38. *International Covenant on Civil and Political Rights*, art. 18 (Mar. 23, 1976), 999 U.N.T.S. 171 (emphasis added). Similarly, the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, supra* n. 6, provides, in art. 1, ¶ 3: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."

The idea of an "established" church is a familiar one.[39] For Americans, the best known and most relevant example is the Church of England, which, from before the time of the American founding to the present, has been the established church in England.[40] (Though the Church of England was much more established in the past than it is today.[41]) In the United States, however, unlike in England, there may be no established church. At

39. If the idea is insufficiently familiar, one need only read Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: The Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003). According to McConnell:

> An establishment is the promotion and inculcation of a common set of beliefs through governmental authority. An establishment may be narrow (focused on a particular set of beliefs) or broad (encompassing a certain range of opinion); it may be more or less coercive; and it may be tolerant or intolerant of other views. During the period between initial settlement and ultimate disestablishment, American religious establishments moved from being narrow, coercive, and intolerant to being broad, relatively noncoercive, and tolerant. Although the laws constituting the establishment were ad hoc and unsystematic, they can be summarized in six categories: (1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church.

Id. at 2131. For a sketch of different kinds of religious establishment, from extreme to moderate, see W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in *Religious Human Rights in Global Perspective: Legal Perspectives* 1, 12-25 (Johan D. van der Vyver & John Witte, Jr., eds., Martinus Nijhoff Publishers 1996).

40. *Cf.* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 119 (2000) ("Let us recall the world the Founders aimed to repudiate, a world where a powerful church hierarchy was anointed as the official government religion, where clerics ex officio held offices in the government, and where members of other religions were often barred from holding government posts.").

41. How established is the Church of England today? *See* Cheryl Saunders, *Comment: Religion and the State*, 21 Cardozo L. Rev. 1295, 1295-96 (2000):

> The special status of the Church of England manifests through legal links with the British crown. Under legislation, the reigning queen or king is "supreme governor" of the church and swears a coronation oath to maintain it. As such, the monarch may not be a Catholic, or marry a Catholic, and must declare on accession to the throne that he or she is a Protestant.
>
> This is surprising enough in a western liberal democracy at the end of the twentieth century. But there is more. The monarch also appoints the archbishops and other reigning church dignitaries. Twenty-six of these "Lords Spiritual" sit in the upper house of the legislature, the House of Lords. The British Parliament can legislate for the church and can prescribe modes of worship, doctrine and discipline. And the church has delegated legislative authority in relation to church affairs. Measures initiated by the church may be accepted or rejected, but not amended, by the Parliament and override earlier inconsistent law.
>
> As usual with the British system of government, however, what you see is not exactly what you get. In advising the crown on appointments to church positions, the prime minister draws names from a list provided by church authorities. As a practical matter, Parliament is unlikely to veto legislative measures initiated by the church, or to act unilaterally in relation to other church affairs. Vernon Bogdanor draws attention to a House of Commons debate on the ordination of women priests in 1993, in which several Members expressed the view that the House should not be discussing the view at all.

Clearly, and happily, that England has an established church does not mean all that it once meant. Nonetheless, that England *still* has an established church remains controversial. *See e.g.* Clifford Longley, *Establishment—It's Got to Go*, The Tablet (London) 2 (May 11, 2002); Clifford Longley, *An Act That Holds Us Back*, The Tablet (London) 362 (Mar. 17, 2001).

its uncontroverted core, the nonestablishment norm forbids government to enact any law or adopt any policy that treats any church as the official church of the political community. (When I say "any church," I mean to include any range of theologically kindred churches—for example, Christian churches, which, though denominationally diverse, are sometimes referred to in the singular, as "the Christian church.") To say that government may not establish religion is centrally to say that government may not act for the purpose of bestowing legal favor or privilege on any church—that is, on any church *as such*—in relation to any other church (or churches). More precisely: Government may not act for the purpose of favoring any church in relation to any other church on the basis of the view that the favored church is, as a church, as a community of faith, better along one or another dimension of value—truer, for example, or more efficacious spiritually, or more authentically American. The nonestablishment norm deprives government of jurisdiction to make judgments about which church, if any, is, as such, better than another church. The norm requires government to be agnostic about which church—which community of faith—is better; government must act without regard to whether any church is in fact better.[42] In particular, government may not privilege, in law or policy, membership in any church—in the Fifth Avenue Baptist Church, for example, or in the Roman Catholic Church, or in the Christian church generally;[43] nor may it privilege a worship practice—a prayer, liturgical rite, or religious observance—of any church.[44]

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42. As William Brennan once put it: "It may be true that individuals cannot be 'neutral' on the question of religion. But the judgment of the Establishment Clause is that neutrality by the organs of *government* on questions of religion is both possible and imperative." *Marsh v. Chambers*, 463 U.S. 783, 821 (1983) (Brennan & Marshall, JJ., dissenting).

However, neither the nonestablishment norm nor the free exercise norm should be understood to call into question the following proposition: Government may make a policy choice on the basis of a position that one or more churches happen to reject, even though the policy choice has the effect of disfavoring those churches relative to other churches that do not reject the position. An example of such a position: Racist ideologies are false and evil. To say that government may not act for the purpose of favoring one or more churches in relation to one or more other churches, or to no church at all, on the basis of the view that the favored church is, as a church—as a community of faith—better along one or another dimension of value (truer, for example, or more efficacious spiritually, or more authentically American) is *not* to say that government may not take a stand on an issue that happens to be opposed to a stand that one or more churches happen to take. Such a rule would be not merely extreme, but extremely silly.

43. For an example of a position that privileges the Christian church, see generally *Other Faiths Are Deficient, Pope Says*, The Tablet (London) 157 (Feb. 5, 2000). "The revelation of Christ is 'definitive and complete[,'] Pope John Paul affirmed to the Congregation for the Doctrine of the Faith, on 28 January. He repeated the phrase twice in an address which went on to say that non-Christians live in 'a deficient situation, compared to those who have the fullness of salvific means in the Church.'" The harsh doctrine that there is no salvation outside the church has been revised, however. "[Pope John Paul II] recognized, following the Second Vatican Council, that non-Christians can reach eternal life if they seek God with a sincere heart. But in that 'sincere search' they are in fact 'ordered' towards Christ and his Church." *Id.*

44. *Cf.* Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U. Cal. Davis L. Rev. 793, 812-13 (1996) (arguing that "[a]t the core of the Establishment Clause

So far as I can discern, there is no serious controversy among constitutional scholars, jurists, or lawyers in the United States about the central meaning of the nonestablishment norm: The norm centrally means what the preceding paragraph says it means, it centrally forbids what the preceding paragraph says it forbids. There *is* serious controversy, however, among Supreme Court justices and others, about the import—the implications—of the nonestablishment norm. There is serious controversy, that is, about what we should understand the nonestablishment norm to forbid in one or another context, given the central meaning of the norm.[45]

There are two principal contexts in which this controversy festers, one of which is that of government aid to religiously affiliated organizations. In the opening chapter of my recent book, *Under God? Religious Faith and Liberal Democracy*, I explained why we should not understand the nonestablishment norm, given its central meaning, to bar government aid to religiously affiliated organizations—for example, to religiously affiliated schools or to faith-based social service organizations. (This is not to say that such aid necessarily complies with the nonestablishment norm, only that such aid does not necessarily violate the norm.) There is no need to rehearse my argument here.[46] In this essay, I want to focus on the second

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should be the principle that government cannot engage in a religious observance or compel or persuade citizens to do so").

45. From 1947, when, in *Everson*, 330 U.S. 1, the Supreme Court first applied the nonestablishment norm to the states, to the present, the justices of the Court have themselves been sharply divided about the implications of the nonestablishment norm in various contexts. The result has been somewhat chaotic case law. Clarence Thomas has noted that "our Establishment Clause jurisprudence is in hopeless disarray." *Rosenberger v. Rector and Visitors of U. of Va.*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring). Many scholars concur in this judgment. *See e.g.* Jesse H. Choper, *Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses* 174-76 (U. Chi. Press 1995); Amar, *supra* n. 40, at 119 (Akhil Amar has referred to "the many outlandish (and contradictory) things that have been said about [the nonestablishment norm] in the *United States Reports*.").

46. I developed my position with particular reference to government aid in the form of school vouchers. *See* Michael J. Perry, *Under God? Religious Faith and Liberal Democracy* 3-19 (Cambridge U. Press 2003). In my judgment, government does not violate the nonestablishment norm, given the central meaning of the norm—that is, it does not *necessarily* violate the norm—by permitting religiously affiliated schools to participate in its voucher program. By including schools in its voucher program without regard to whether or not they are religiously affiliated, government is not necessarily taking any action that favors a church in relation to another church on the basis of the view that the favored church is, as a church, truer, or more efficacious spiritually, or more authentically American, or otherwise better; nor, in particular, is government necessarily privileging membership in, or a worship practice of, a church. Government may include religiously affiliated schools in its voucher program, or other aid program, if, and only if, each of two criteria are satisfied. The first criterion speaks to the design of the voucher program; the second, to the basis of the political choice to adopt the program.

> *First.* The eligibility requirements for school participation in the program are religiously neutral; school participation in the program does not depend on whether or not the school is religiously affiliated.

If this criterion is *not* satisfied, it is fair for the courts to presume that the political choice to adopt the program is based on the belief that the favored church(es) is, as a church, truer, or more efficacious spiritually, or more authentically American, or otherwise better than another

principal context in which controversy about the import of the nonestablishment norm festers: that of government affirmation of a religious premise (or premises). Should we understand the nonestablishment norm (i.e., given its central meaning) to forbid government to affirm any religious (theological) premise whatsoever? That is, should we understand the nonestablishment norm such that government affirmation of any religious premise, *no matter what premise it is*, necessarily violates the norm?

There are many different ways in which government affirms, or has affirmed, one or more religious premises. Some of the more prominent examples include: In 1954, Congress added the words "under God" to the Pledge of Allegiance ("one nation under God").[47] Also in 1954, "Congress requested that all U.S. coins and paper currency bear the slogan, 'In God We Trust.' On July 11, 1955, President Eisenhower made this slogan mandatory on all currency. In 1956 the national motto was changed from 'E Pluribus Unum' to 'In God We Trust.'"[48] The proceedings of many courts in the United States, including the Supreme Court of the United States, begin with a court official intoning "God save the United States and this Honorable Court."[49] Some school districts mandated the reading of Bible or the saying of the Lord's Prayer, or some other prayer, at the beginning of the school day.[50] Some officials, including some judges, have posted the Ten Commandments in public places, such as the wall of a public school and the wall of a courtroom.[51] In each example, government is

church(es). But even if this criterion *is* satisfied, it still may be the case that the political choice to adopt the program is based on—that the program would not have been adopted but for—that belief. In that sense, the program may be a subterfuge: a covert establishment of religion. *Cf. Rosenberger*, 515 U.S. at 840 ("The governmental program here is neutral toward religion. There is no suggestion that the University created it to advance religion or adopted some ingenious device with the purpose of aiding a religious cause."). Hence, the need for this second criterion, which comes into play only if the voucher program satisfies the first criterion:

> *Second.* Government's adoption of the voucher program, though it may operate to favor one or more churches (namely, those that sponsor many eligible primary or secondary schools) in relation to one or more other churches (those that do not sponsor many or even any such schools), is not based on the belief that the favored church(es) is, as a church, better (truer, etc.) than one or more other churches or than no church at all.

The inquiry here—the inquiry into the possibility of a covert establishment of religion—is analogous to the inquiry into the possibility of covert racial discrimination. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 271 n. 21 (1977); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023, 1036-40 (1979).

47. *See* John W. Baer, *The Pledge of Allegiance: A Centennial History, 1892-1992* (John W. Baer 1992) (for a history of the Pledge of Allegiance, which makes its first appearance in 1892); *id.* at 62-63 (the story of adding "under God" to the Pledge involves both the Knights of Columbus (a Roman Catholic organization) and post-World War II anticommunism).

48. *Id.* at 63.

49. *See Marsh*, 463 U.S. 783, 786 ("In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, 'God save the United States and this Honorable Court.' The same invocation occurs at all sessions of this Court.").

50. *See e.g. Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

51. *See e.g. Stone v. Graham*, 449 U.S. 39 (1980).

obviously affirming one or more religious premises. If we should understand the nonestablishment norm such that government affirmation of any religious premise, no matter what the premise, necessarily violates the norm, then it follows, as night follows day, that each example violates the nonestablishment norm. But is such an understanding the best understanding of what the nonestablishment norm forbids?

I am about to sketch two different understandings of what the nonestablishment norm forbids in this context. But it bears emphasis that no plausible understanding denies either of two points:

> First, the nonestablishment norm forbids government to affirm any religious premise whose affirmation by government would violate the central meaning of the norm. For example, government may not affirm—explicitly or implicitly, directly or indirectly—that Jesus is Lord, or that the Roman Catholic Church is the one true church.
>
> Second, *if* there are one or more religious premises that government may affirm—one or more premises, that is, whose affirmation by government would not violate the central meaning of the nonestablishment norm—government, in affirming such a premise, may not coerce anyone to affirm the premise.[52]

We don't need the nonestablishment norm to explain the second point; the free exercise norm is sufficient. As a moment's reflection will confirm, the free exercise norm protects not only one's freedom to practice one's own religion, but also one's freedom to refuse to participate in any religious practice that one does not want to participate in—or, indeed, to participate in any religious practice whatsoever. (Perhaps one has no religion.) This "negative" freedom—this freedom not to participate in a, or any, religious practice—includes the freedom not to affirm a religious premise that one does not want to affirm.[53]

Now, imagine two different understandings of what, in this context, the nonestablishment norm forbids. According to the first, and more restrictive, understanding, government may not affirm any religious premise

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52. Sharp disagreement about whether government is in fact coercing anyone—or, more generally, about what, at the margin, "coerce" should be understood to mean—is not uncommon. *See e.g. Lee v. Weisman*, 505 U.S. 577 (1992).

53. A prayer typically contains one or more religious premises that some religious believers do not affirm and that all nonbelievers do not affirm. To require someone to participate in prayer, therefore, may be to require him (or her) to affirm one or more religious premises that he does not affirm. Moreover, to require a nonbeliever to participate in prayer, however "generic" the prayer may be, is to require him to participate in a religious practice that he does not accept. To require a believer to participate in petitionary prayer may be to require him to participate in a religious practice that he does not accept, because not all religious believers accept petitionary prayer. As Jim Morrison screamed: "You cannot petition the Lord with prayer!" The Doors, *The Soft Parade*, in *The Soft Parade* (Elektra/Asylum 1969) (CD). *See also Chambers*, 463 U.S. at 820 (Brennan & Marshall, JJ., dissenting) (quoting Merton).

whatsoever.[54] According to the second, and less restrictive, understanding, government may affirm any religious premise whatsoever whose affirmation by government would not violate the central meaning of the norm.[55] The more restrictive understanding is problematic for two reasons, the first of which is a matter of principle, the second, a matter of political realism. The matter of principle: The more restrictive understanding presupposes that there is no religious premise whose affirmation by government would not violate the central meaning of the nonestablishment norm. But this is false. A single example will suffice. Since 1954, the Pledge of Allegiance has echoed Abraham Lincoln's Gettysburg Address in declaring that we are "one nation under God." (At Gettysburg, Lincoln resolved that "this nation, under God, shall have a new birth of freedom.") In affirming, with Lincoln, that ours is a nation that stands under the judgment of a righteous God,[56] it

54. *See* William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 Notre Dame L. Rev. 11, 21, 21 n. 57 (2002). Bill Marshall has written recently that "First Amendment law is relatively settled on the theoretical position that explicit state sponsorship of religion is impermissible." It is clear from his essay that by "state sponsorship of religion" Marshall means to include the kind of state affirmation of religious premises entailed by state sponsorship of prayer. Marshall cites two cases in support of his statement of what is "relatively settled"—*Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) and *Lee v. Weisnman*, 505 U.S. 577, 587 (1992). Now, I don't mean to deny that the Supreme Court's nonestablishment rhetoric lends much support, direct and indirect, to the proposition that "state sponsorship of religion is impermissible." *But see Chambers*, 463 U.S. 783 (Nebraska legislature does not violate establishment clause by designating and paying a chaplain to pray at beginning of legislative session). Nonetheless, the decision in each of the two cases Marshall cites can readily be understood on the basis of the rule (a rule most naturally assimilated to the free exercise norm) that *if* there are one or more religious premises that government may affirm—one or more premises, that is, whose affirmation by government would not violate the central meaning of the nonestablishment norm—government, in affirming such a premise, may not coerce anyone to affirm the premise. *See supra* n. 52 and accompanying text.

Still, I am undoubtedly swimming against the tide of much scholarly opinion in this essay. For a sampling of that opinion, see Kent Greenawalt, *Five Questions about Religion Judges Are Afraid to Ask*, in *Obligations of Citizenship and Demands of Faith* 196, 197 (Nancy L. Rosenblum, ed., 2000) (declaring that "[t]he core idea that the government may not make determinations of religious truth is firmly entrenched"); Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 108 (2002) (stating that it is an "axiom" that the "Establishment Clause forbids the state from declaring religious truth"); Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 7 (1986) ("In my view, the establishment clause absolutely disables the government from taking a position for or against religion. . . . The government must have no opinion because it is not the government's role to have an opinion.").

55. This understanding of the nonestablishment norm would easily tolerate the sort of religious expression that Bill Marshall, on the basis of the more restrictive understanding of the nonestablishment norm struggles to defend in his recent essay. Marshall, *supra* n. 54, at 79 Notre Dame L. Rev. 11, 21, 21 n. 57 (2002).

56. The Declaration of Independence, which marks the first formative moment in the emergence of the United States of America, famously relies—explicitly so—on belief in God: "We hold these truths to be self-evident, that all men are *created* equal, that they are endowed by their *Creator* with certain unalienable Rights." *The Declaration of Independence* [¶ 2] (1776) (emphasis added). If the Declaration marks a formative moment in the birth of the United States, two texts of Abraham Lincoln mark formative moments in the nation's rebirth: the Gettysburg Address and the Second Inaugural Address (which is surely one of the most theologically intense political

seems clear that government is not treating any church (or any range of theologically kindred churches) as the official church of the political community; government is not bestowing legal favor or privilege on any church in relation to any other church; government is not taking any action that favors any church in relation to any other church on the basis of the view that the favored church is, as a church, as a community of faith, better along one or another dimension of value; government is not privileging either membership in, or a worship practice of, any church.

Now, the second reason that the more restrictive understanding is problematic: Very few citizens of the United States would take seriously—and very few would tolerate—a constitutional provision according to which having "under God" in the Pledge or "In God We Trust" as the national motto, or beginning a session of court with "God save the United States and this Honorable Court," is unconstitutional. Such a provision would be widely regarded, and widely dismissed, as extreme.[57] One might say that

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speeches in American history). "The Almighty," said Lincoln in his Second Inaugural, "has His own purposes. 'Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh.'" Abraham Lincoln, Address, *Second Inaugural Address* (Washington D.C., March 4, 1865) (copy of transcript on file with the U. of Okla. L. Ctr.); The University of Oklahoma Law Center, *The Second Inaugural Address of President Abraham Lincoln*, www.law.ou.edu/hist/lincoln2.html (accessed Feb. 20, 2004) [hereinafter *Lincoln's Second Inaugural Address*]. Lincoln continued:

> If we shall suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord are true and righteous altogether." With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in.

Although we citizens of the United States of America don't recite the Declaration, the Gettysburg Address, or Lincoln's Second Inaugural, we *do* recite, frequently, the Pledge of Allegiance. According to the Pledge, the United States of America is a nation "under God." 4 U.S.C. § 4 (1998). A nation that, as Lincoln insisted in his Second Inaugural, stands under the judgment of a righteous God. Politicians and others are fond of asking God to "bless" America. Lincoln understood that the God who can, in judgment, bless America can also, in judgment, damn her: "He gives to both North and South, this terrible war as the woe due to those by whom the offence came. . . . [A]s was said three thousand years ago, so still it must be said 'the judgments of the Lord, are true and righteous altogether.'" *Lincoln's Second Inaugural Address.*

57. Consider, for example, the overwhelmingly hostile response to the federal court's decision in *Newdow v. U.S. Congress*, 292 F.3d 597 (9th Cir. 2002) (judgment stayed on June 27, 2002, pending disposition of a petition for rehearing en banc), that Congress violated the nonestablishment norm in adding "under God" to the Pledge of Allegiance in 1954. *See* Evelyn Nieves, *Judges Ban Pledge of Allegiance from Schools, Citing 'Under God,'* 152 N.Y. Times A1 (June 27, 2002); Howard Fineman, *One Nation, Under . . . Who?* Newsweek 20 (July 8, 2002).

On Feb. 28, 2003, the United States Court of Appeals for the Ninth Circuit refused to grant the petition for rehearing en banc. Moreover, the court withdrew its original opinion and filed an amended opinion. In its amended opinion, which presumably the court believed to be less provoc-

this second reason is a bad reason—at the very least, a problematic reason—for rejecting a good (accurate, proper) understanding of a constitutional norm. No doubt! But the question here is precisely what is a good understanding—indeed, what is the best understanding—of the nonestablishment norm? The first reason responds to that question. It seems to me undeniable that the second reason, which is a matter of political realism, reinforces the first and determinative reason, which is a matter of principle.

Correspondingly, there are two reasons why the less restrictive understanding of what the nonestablishment norm forbids in this context makes more sense than the more restrictive understanding. First, the less restrictive understanding recognizes what the more restrictive understanding mistakenly denies: that there are at least *some* religious premises whose affirmation by government does not, or would not, violate the central meaning of the nonestablishment norm.[58] Second, the less restrictive understanding does not entail a conclusion—namely, that having "under God" in the Pledge or "In God We Trust" as the national motto, or beginning a session of court with "God save the United States and this Honorable Court," violates the constitutional imperative against government establishment of religion. That would be one that most citizens of the United States would greet as ridiculously extreme. My strong sense is that vast majority of American citizens, including many who are not religious believers, would agree with Supreme Court Justice Antonin Scalia: "Although the Constitution says that government cannot 'establish' or promote religion, the framers did not intend for God to be stripped from public life."[59]

Let's now look more closely at the less restrictive understanding, according to which, again, having "under God" in the Pledge (or "under God"

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ative than its original opinion, the court ruled, principally on the basis of the Supreme Court's decisions in *Lee*, 505 U.S. 577, and other school prayer cases, that just as the defendant school district could not, consistently with the nonestablishment norm, require or authorize teachers to lead their students in saying a prayer, it could not authorize teachers to lead their students in the saying of the Pledge (because of the "under God" language added to the Pledge in 1954 by Congress). *See Newdow v. U.S. Cong.*, 328 F.3d 466 (9th Cir. 2003). On Apr. 30, 2003, the Bush administration appealed to the Supreme Court to reverse the 9th Circuit ruling. *See* Anne Gearan, *Bush Administration Asks High Court to Preserve 'Under God' in Pledge of Allegiance*, Associated Press (Apr. 30, 2003) (available at Westlaw 4/30/03 APWIRES 15:25:00) (also published as *Administration Appeals for 'Under God,'* 153 N.Y. Times (May 1, 2003)).

58. *Cf. ACLU of Ohio v. Capital Square Rev. & Advisory Bd.*, 243 F.3d 289, 293 (6th Cir. 2001):

> For most of our history as an independent nation, the words of the constitutional prohibition against enactment of any law "respecting an establishment of religion" were commonly assumed to mean what they literally said. The provision was not understood as prohibiting the state from merely giving voice, in general terms, to religious sentiments widely shared by those of its citizens who profess a belief in God. . . . [T]he principal thrust of the prohibition was to prevent any establishment by the national government of an official religion, including an established church such as that which existed in England at the time the American colonies won their independence from the Crown.

59. Associated Press, *Scalia Decries Court Rulings on Religion* (Jan. 13, 2003) (available at LEXIS, Nexis library AP file). *See* Associated Press, *Scalia Decries Court Rulings on Religion*, 153 N.Y. Times A19 (Jan. 13, 2003).

as the national motto, or the like) does not violate the nonestablishment norm. Would it violate the nonestablishment norm, according to the less restrictive understanding, to have "under Christ" in the Pledge ("one nation under Christ") or "In Christ We Trust" as the national motto, or to begin a session of court with "Christ save the United States and this Honorable Court"? To arrive at the right answer, we must inquire: In adding "under Christ" to the Pledge, is government treating any church as the official church of the political community; is government bestowing legal favor or privilege on any church in relation to any other church; is government taking any action that favors any church in relation to any other church on the basis of the view that the favored church is, as a church, as a community of faith, better along one or another dimension of value; is government privileging either membership in, or a worship practice of, any church? It seems undeniable that in adding "under Christ" to the Pledge, government *is* treating the Christian church—that is, the Christian church *as a whole*, though not any particular denomination of it—as the official church of the political community. Government *is* bestowing legal favor or privilege on the Christian church. Government *is* taking an action that favors the Christian church in relation to other churches and communities of faith on the basis of the view that the Christian church is, as a church, as a community of faith, better along one or another dimension of value. Government *is* privileging membership in the Christian church. So, according to the less restrictive understanding of what the nonestablishment norm forbids, having "under Christ" in the Pledge *would* violate the norm.

In a recent essay, Steve Shiffrin claims that the United States has evolved from a country that is historically Christian into a country that is "officially monotheistic."[60] Shiffrin then states:

> Proponents of a high wall between church and state, who would remove "under God" from the Pledge of Allegiance, are wishing for a country that does not exist and probably never will. Our Constitution must be interpreted in the light of our evolving traditions—like it or not. So we make compromises and today government can say "In God we trust" on its coins but not "In Christ we trust."[61]

Shiffrin's claim—that the United States, though now much less religiously sectarian than it used to be, is "officially monotheistic"—is interesting, provocative, and, I think, substantially correct. At least, the claim is congruent with what I am contending here: For government to affirm any religious premise (or premises) that is nonsectarian as among the great monotheistic faiths—Judaism, Christianity, and Islam—would not be for it to violate the nonestablishment norm. By contrast, for government to affirm any relig-

60. Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 Chi.-Kent L. Rev. 717, 727 (2003).

61. *Id.*

ious premise that is sectarian as among the monotheistic faiths would be for it to violate the nonestablishment norm. In affirming any religious premise that is not ecumenical as among (religious) Jews, Christians, and Muslims—for example, the premise that Jesus is Lord—government's action would be sufficiently sectarian that it would violate the nonestablishment norm, even according to the less restrictive understanding of what the norm forbids. For government to affirm any religious premise that is sectarian as among Jews, Christians, and Muslims would be for it to violate the central meaning of the nonestablishment norm.

Why shouldn't we go further and embrace an understanding of the nonestablishment norm according to which government would violate the nonestablishment norm if the religious premise it affirms, though nonsectarian as among the monotheistic faiths, is sectarian as between, on the one side, the monotheistic faiths and, on the other side, Hinduism, Buddhism, and other, nonmonotheistic faiths? This essay has been, in part, an attempt to answer that question. Most who reject my answer will agree that an understanding of the nonestablishment norm according to which government may not affirm any religious premise that Hindus, Buddhists, etc., reject would require us to conclude that having "under God" in the Pledge or "In God We Trust" as the national motto, or beginning a session of court with "God save the United States and this Honorable Court," or the like, is unconstitutional. (The "God" in all those iterations is undeniably the Abrahamic God, the God—the "one, true God"—who creates and sustains us out of love. This "God" is not one of the members of the Hindu pantheon of divinities. Nor is this God affirmed by Buddhists, who are, in the main, nontheistic.)[62] That conclusion, however, is radically out of synch with any historical or traditional understanding of what the nonestablishment norm forbids—that is, any understanding that could plausibly be defended as historical or traditional.[63] It is also radically out of synch with the

62. I say "most" will agree, because some will resist the conclusion by affirming the disingenuous strategy I discuss below. *See infra* nn. 70-75 and accompanying text.

63. *See ACLU*, 243 F.3d at 298:

> [The establishment clause] was not understood to be a prohibition against fostering or protecting religion . . . nor was it understood to be a prohibition against employing generalized religious language in official discourse. The notion that the First Amendment was designed to impose a secular political culture on the nation would have struck most 19th Century judges as absurd.

Earlier in its opinion, the court quoted the following passage from an article by Steve Smith:

> In approving the establishment clause, the framers had adopted a principle of *institutional* separation, but they had neither undertaken to impose a secular political culture on the nation nor consented to abandon their own religious values and culture when serving as public officials. Indeed, any such undertaking would have required a seemingly impossible intellectual and psychological surgery. Proclaiming a national day of thanksgiving, or inviting a chaplain to offer a prayer before congressional sessions, were actions of undeniable religious import. But through these actions the government did not intrude into the internal affairs of any church. Nor did these actions confer governmental authority upon churches; Congress did not endow the chaplain with authority to debate, vote, or directly influence governmental decisions. Hence thanksgiving procla-

sentiments and sensibilities of the overwhelming majority of citizens of the United States—so radically out of synch that any understanding of the nonestablishment norm that would require this conclusion is, if not unacceptable, at least deeply problematic. Therefore—and as even those who reject my answer will probably agree—the Supreme Court will not, in any remotely foreseeable future, embrace that conclusion; it will not rule that having "under God" in the Pledge (or "In God We Trust" as the national motto, or the like) is unconstitutional. If the Supreme Court, in a science fiction scenario, were to hold that having "under God" in the Pledge is unconstitutional, "We the People" would rush to amend the Constitution to overrule the Court.[64]

Although it is undeniably true that having "under God" in the Pledge, "In God We Trust" as the national motto, and the like, offends some Americans—including, no doubt, some readers of this essay—it is far from obvious that this fact is constitutionally significant. We should not assume that protecting some of us from such offense is the point—or even *a* point—of the nonestablishment norm.[65] It bears repetition that so long as a government respects the free exercise of religion, its affirmation of one or more religious premises does not violate anyone's human right to freedom of religion:[66] The international law of human rights protects the free exercise

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mations and legislative prayers were simply not inconsistent with the decision reflected in the establishment clause.

Id. at 297 (quoting Steven D. Smith, *Separation and the 'Secular': Reconstructing the Disestablishment Decision*, 67 Tex. L. Rev. 955, 973 (1989)).

64. *Cf.* Steven G. Gey, *"Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. Rev. 1865 (2003) (reporting on the virtually unanimous negative response to the federal court's decision in *Newdow*, 292 F.3d 597).

65. *Cf.* Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* 164-65 n. 66 (Oxford U. Press 1995):

> [T]he very concept of "alienation," or symbolic exclusion, is difficult to grasp. . . . How, if at all, does "alienation" differ from "anger," "annoyance," "frustration," or "disappointment" that every person who finds himself in a political minority is likely to feel? "Alienation" might refer to nothing more than an awareness by an individual that she belongs to a religious minority, accompanied by a realization that at least on some issues she is unlikely to be able to prevail in the political process. . . . That awareness may be discomforting. But is it the sort of phenomenon for which constitutional law can provide an efficacious remedy? Constitutional doctrine that stifles the message will not likely alter the reality—or a minority's awareness of that reality.

66. Consider, in that regard, the Constitution of Ireland, which, in the Preamble, affirms a nonsectarian Christianity:

> In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, we, the people of Eire, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, . . . do hereby adopt, enact, and give to ourselves this Constitution.

Preamble, Const. of Ireland, 1937. Moreover, Article 6 states, in relevant part: "All powers of government, legislative, executive, and judicial, derive, *under God*, from the people, whose right it is to designate the rulers of the State and, in the final appeal, to decide all questions of national policy, according to the requirements of the common good." *Id.* at art. 6, §1 (emphasis added). Article 44 of the Constitution states, in relevant part: "The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and

of religion, but, as I noted earlier, it does not contain anything like a nonestablishment norm.[67]

Where does the Supreme Court stand with respect to the issue we've been discussing? We must distinguish between, first, what the Court has occasionally *said* about the meaning of the nonestablishment norm and, second, the decision that the Court *would actually reach* in a relevant case. As Steven Gey has argued persuasively in a recent essay, if we take seriously

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honor religion." *Id.* at art. 44, § 1; *see* Gerard Hogan & G. F. Whyte, *The Irish Constitution: J.M. Kelly* 6-7 (3d ed., Butterworths 1994) (discussing "religion in the Preamble"). Although it affirms Christianity, the Irish Constitution explicitly disallows the "endowing" of any religion. Article 44 states: "The State guarantees not to endow any religion." Const. of Ireland art. 44, § 2(2).

Given the religious commitments of the vast majority of the people of Ireland, it is not at all surprising that the Irish Constitution affirms Christianity. In so doing, the Irish Constitution violates no human right. Three things are significant here. First, the religious convictions implicit in the Irish Constitution's affirmation of Christianity in no way deny—indeed, they affirm—the idea that *every* human being, *Christian or not*, is inviolable; they affirm, that is, the idea of human rights. Second, the Irish Constitution's affirmation of Christianity is not meant to insult or demean anyone; it is meant only to express the most fundamental convictions of the vast majority of the people of Ireland. Third, and most importantly, the Irish Constitution protects the right, which is a human right, to freedom of religion; moreover, it protects this right not just for Christians, who are the vast majority in Ireland, but for all citizens. Article 44 states, in relevant part: "Freedom of conscience and the free profession and practice of religion are . . . guaranteed to every citizen. . . . The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status." *Id.* at § 2, 2(3). Article 44 also states that "[l]egislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, *nor be such as to effect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.*" *Id.* at § 2(4) (emphasis added). Therefore, the conclusion that in affirming Christianity the Irish Constitution violates a human right—or that in consequence of the affirmation Ireland falls short of being a full fledged liberal democracy—is, in a word, extreme.

If what Brian Barry says in the following passage is true with respect to England, which has an established church, then it is even more true—it is true in spades—with respect to the United States, which has no established church, but only such comparatively minor things as "under God" in the Pledge and "In God We Trust" as the national motto:

> We must, of course, keep a sense of proportion. The advantages of establishment enjoyed by the Church of England or by the Lutheran Church in Sweden are scarcely on a scale as to lead anyone to feel seriously discriminated against. In contrast, denying the vote to Roman Catholics or requiring subscription to the Church of England as a condition of entry to Oxford or Cambridge did constitute a serious source of grievance. Strict adherence to justice as impartiality would, no doubt, be incompatible with the existence of an established church at all. But departures from it are venial so long as nobody is put at a significant disadvantage, either by having barriers put in the way of worshipping according to the tenets of his faith or by having his rights and opportunities in other matters (politics, education, occupation, for example) materially limited on the basis of his religious beliefs.

Brian Barry, *Justice as Impartiality* 165 n. c (Oxford U. Press 1995).

67. In particular, the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, which is the principal international document concerning religious freedom, contains nothing like a nonestablishment requirement. *Supra* n. 6.

While I was drafting this essay, the countries of Europe, in discussing "the constitution that will eventually be adopted to govern the European Union after it expands from its current 15 members to 25 members next spring," became embroiled in their own controversy about whether to affirm, in the constitution, "the religious heritage of Europe." *See* Richard Bernstein, *Continent Wrings Its Hands Over Proclaiming Its Faith*, N.Y. Times A4 (Nov. 12, 2003).

what the Court has said about the meaning of the nonestablishment norm, we must conclude, as a federal court in California recently did,[68] that Congress acted unconstitutionally, in 1954, in adding "under God" to the Pledge of Allegiance.[69] But based on the decision the Court would actually reach in a case challenging "under God" in the Pledge or "In God We Trust" as the national motto, we should infer that according to the Supreme Court's (implicit) understanding of the nonestablishment norm, and notwithstanding what the Court has sometimes said, government *may* affirm some religious premises.

Is the inference too quick? Is a different inference equally plausible, if not more so—namely, that the Supreme Court believes that by having "under God" in the Pledge or "In God We Trust" as the national motto, government is not affirming any truly religious premises? In his dissenting opinion in *Marsh v. Chambers*, William Brennan (joined by Thurgood Marshall) wrote: "I frankly do not know what should be the proper disposition of features of our public life such as 'God save the United States and this Honorable Court,' 'In God We Trust,' 'One Nation Under God,' and the like. I might well adhere to the view . . . that such mottoes are consistent with the Establishment Clause . . . because they have lost any true religious significance."[70] Following Justice Brennan's lead, one might be tempted to argue that having "under God" in the Pledge or "In God We Trust" as the national motto, or the like, is not unconstitutional because the premises that government thereby affirms are not really religious premises; such statements are, instead, merely ceremonial utterances devoid of authentically religious content.[71] This may be a convenient strategy for concluding that having "under God" in the Pledge (or the like) is not unconstitutional, but it is also a palpably disingenuous strategy. There are *some* citizens, no doubt, for whom the affirmed premises are merely ceremonial, religiously empty utterances; it is simply mistaken, however, to think that the premises are religiously empty for most—or that they were religiously empty for the members of Congress who, in 1954, added "under God" to the Pledge.[72] It should be especially clear, post-September 11, 2001, that for most Ameri-

68. *See* Gey, *supra* n. 64.

69. *Id.*; *see also* Associated Press, *supra* n. 61. "[Justice] Scalia, the main speaker at an event for Religious Freedom Day, said past rulings by the Supreme Court gave the judges in the pledge case 'some plausible support' to reach that conclusion." (Scalia was referring to the federal court's conclusion in *Newdow*, 292 F.3d 597, that Congress violated the nonestablishment norm in adding "under God" to the Pledge of Allegiance in 1954.). *Cf. Lee v. Weisman*, 505 U.S. 577, 639 (1992) (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting) ("Must the Pledge [of Allegiance] therefore be barred from the public schools (both from graduation ceremonies and the classroom)? . . . Logically, that ought to be the next project for the Court's bulldozer.").

70. *Marsh*, 463 U.S. at 818.

71. *Cf.* Marshall, *supra* n. 54, at 23 (discussing "ceremonial deism").

72. No one with any doubt on this score should fail to read Steven Gey's essay. *See* Gey, *supra* n. 64.

cans, the affirmed premises resonate with an authentic and rich theological content: in particular, that there is a God; that God created us and sustains us; that God loves us;[73] that because God loves us, we are sacred and, therefore, inviolable;[74] and that, as Lincoln proclaimed in his Second Inaugural, we stand under the judgment of this righteous God.[75] The inference in the preceding paragraph presupposes (naively?) that the Supreme Court would not deploy a disingenuous strategy in support of its predictable decision that "under God" in the Pledge of Allegiance, "In God We Trust" as the national motto, and "God save the United States and this Honorable Court" intoned at the beginning of a court session—that none of these violates the nonestablishment norm.[76]

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73. Do Judaism, Christianity, and Islam agree on the scope of the "us"? Is "us" each and every human being? As Hilary Putnam has noted, the moral image central to what Putnam calls the Jerusalem-based religions "stresse[s] equality and also fraternity, as in the metaphor of the whole human race as One Family, of all women and men as sisters and brothers." Hilary Putnam, *The Many Faces of Realism* 60-61 (Open Ct. 1987). In an essay on *The Spirituality of The Talmud*, Ben Zion Bokser and Baruch M. Bokser state: "From this conception of man's place in the universe comes the sense of the supreme sanctity of all human life. 'He who destroys one person has dealt a blow at the entire universe, and he who sustains or saves one person has sustained the whole world.'" Ben Zion Bokser & Baruch M. Bokser, *Introduction: The Spirituality of the Talmud*, in *The Talmud: Selected Writings* 30 (Ben Zion Bokser trans., Paulist Press 1989). They continue:

> The sanctity of life is not a function of national origin, religious affiliation, or social status. In the sight of God, the humble citizen is the equal of the person who occupies the highest office. As one talmudist put it: "Heaven and earth I call to witness, whether it be an Israelite or pagan, man or woman, slave or maidservant, according to the work of every human being doth the Holy Spirit rest upon him." . . . As the rabbis put it: "We are obligated to feed non-Jews residing among us even as we feed Jews; we are obligated to visit their sick even as we visit the Jewish sick; we are obligated to attend to the burial of their dead even as we attend to the burial of the Jewish dead."

Id. at 30-31. *But cf.* Meir Y. Soloveichik, *The Virtue of Hate*, 130 First Things 41 (Feb. 2003). In an e-mail notice on this article, "Rabbi Soloveichik asks: 'Is an utterly evil man . . . deserving of a theist's love?' and, reflecting on his conversations with Christian clergymen, concludes that there is 'no minimizing the difference between Judaism and Christianity on whether hate can be virtuous.' He examines the 'theological underpinnings' for each faith's approach to hate and notes that 'the crucifixion is a story of a loving God seeking humanity's salvation,' but that 'not a single Jewish source asserts that God deeply desires to save all humanity.'" The Chronicle of Higher Education, *A Glance at the February Issue of* First Things: *A Jewish Perspective on Hate and Forgiveness*, http://chronicle.com/prm/daily/2003/02/2003021301j.htm (accessed Feb. 13, 2003).

74. For an explanation of the "therefore," see Michael J. Perry, *The Inviolability of 'the Other': A Nonreligious Ground?* (unpublished manuscript on file with author).

75. Lincoln, *supra* n. 56.

76. *See* Richard John Neuhaus, *Nasty and Nice in Politics and Religion* in *The Public Square: A Survey of Religion and Public Life*, First Things 69, 70 (Mar. 2004):

> [Some argue that the Supreme] Court should rule . . . that "under God" has become so empty of religious meaning that it does not rise to the level of an establishment of religion. In this view, "under God," "In God We Trust," and similar phrases and symbols in public are no more than what Justice Brennan in 1984, borrowing a phrase from Eugene Rostow, called "ceremonial Deism." In other words, such references to God in public are permissible because nobody really believes what they say. In a nation in which 95 percent of the people say they believe in God, the Supreme Court should rule that nobody, or at least nobody that matters, believes in God. Why not? Maybe the Court will next rule that pigs can fly. To the judicial usurpation of politics add the judicial suspension of reality.

IV. CONCLUSION

I have now completed the task I set for myself in this essay: to suggest the sorts of government action that we citizens of the United States should understand—and the sorts, therefore, that we should want the Supreme Court to understand—the free exercise and nonestablishment norms to forbid. An interesting question arises at this point: Which of the Supreme Court's major rulings regarding free exercise or nonestablishment might have been different—and in any event which *should* have been different—had the Court understood the norms along the lines I have proposed here? That, however, is an inquiry for another day. This essay has run its modest course.